No. 03-221

FEB 2 3 2004

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison—Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Attorney General
KENNETH C. BYRNE
Supervising Deputy Attorney General
*PAUL M. ROADARMEL JR.
Deputy Attorney General
*Counsel of Record
300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 897-2396
Fax: (213) 897-2806
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the dismissal of a "mixed" habeas petition is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations in the event of any refiling.

2. Whether a second, untimely habeas petition may relate back to a first habeas petition, where the first habeas petition was dismissed and the first proceeding is no longer pending.

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OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Ford v. Hubbard*, 305 F.3d 875 (CA9 2002), *amended by* 330 F.3d 1086 (CA9 2003), and is reproduced in the appendix to the petition for writ of certiorari. Pet. App. A1-A45.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit affirming in part, vacating in part, and remanding with instructions, was amended and entered on May 15, 2003. Pet. App. A2. The Ninth Circuit denied Warden Pliler's petition for rehearing and suggestion for rehearing en banc on the same date. Pet. App. A13. The petition for writ of certiorari was filed on August 8, 2003, and was granted on January 9, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> (A) the applicant has exhausted the remedies available in the courts of the State * * * *

Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading * * * *

STATEMENT OF THE CASE

On October 11, 1988, respondent Richard Herman Ford and co-defendant Anthony Von Villas, both former Los Angeles Police Department officers, were convicted of first-degree murder for financial gain and conspiracy to commit murder for killing Thomas Weed. After the jury deadlocked during the penalty phase of trial, the trial court sentenced Ford to life without the possibility of parole. *See* Pet. App. A18 (Weed Case).

On November 16, 1992, the California Court of Appeal affirmed the judgment of conviction as to Ford. *See People v. Von Villas*, 11 Cal. App. 4th 175, 257-61, 15 Cal. Rptr. 2d 112, 162-65 (1992). Ford's petition for review in the California Supreme Court was denied. *See* Pet. App. A19. A petition for writ of certiorari was denied by this Court on October 4, 1993. *See Ford v. California*, 510 U.S. 838 (1993).

In a separate trial, Ford and Von Villas were also convicted of conspiracy to commit another murder; the charge named Joan Loguercio as the target. In addition, Ford and Von Villas were convicted of two counts of attempted murder involving Loguercio, as well as robbery, conspiracy to commit robbery, and assault with a firearm. Ford alone was convicted of attempted administration of an intoxicating agent. On March 11, 1989, Ford received a sentence of thirty-six years to life. *See* Pet. App. A16 (Loguercio Case).

On October 9, 1992, the California Court of Appeal affirmed the judgment of conviction. *See People v. Von Villas*, 10 Cal. App. 4th 210, 274-75, 13 Cal. Rptr. 2d 62, 107 (1992). Ford's petition for review in the California Supreme Court was denied. *See* Pet. App. A16. A petition for writ of certiorari was denied by this Court on June 14, 1993. *See Ford v. California*, 508 U.S. 975 (1993).

On April 19, 1997, five days before the expiration of the one-year limitation period for filing petitions under the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter AEDPA), *see* 28 U.S.C. § 2244, Ford signed and submitted a *pro se* petition for writ of habeas corpus challenging his conviction in the Weed Case; the petition was forwarded to the clerk and filed in the United States District Court for the

Central District of California on May 5, 1997.[1] J.A. 58-72. On April 19, 1997, Ford filed a motion to stay the petition while he exhausted his state-court remedies on three claims that were not alleged in the petition. J.A. 73-74. On August 4, 1997, the magistrate judge issued an order determining that claims two, three, and eight through twelve were unexhausted (and noting that Ford had admitted as much, but wished to proceed on those claims that were "actionable"). J.A.79-83; *see also* J.A. 75-78. The magistrate judge denied Ford's motion to stay the mixed petition, but gave Ford the option of dismissing his unexhausted claims and proceeding on the exhausted claims; the magistrate judge also informed Ford that any failure to respond to the court's inquiry would result in the dismissal of the petition. J.A. 80-83; *see also* Pet. App. D1-D2. When Ford did not respond, the district court dismissed the petition without prejudice in a judgment entered on October 14, 1997. Pet. App. D1-D5. No appeal was filed. *See* J.A. 9.

On April 19, 1997, Ford signed and submitted a *pro se* petition challenging his conviction in the Loguercio Case; that petition was likewise filed in the United States District Court

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1. In his first petition in the Weed Case, Ford alleged the following claims: (1) the admission of a tape recording violated his constitutionally-cognizable expectation of privacy; (2) the seizure of evidence exceeded the scope of a warrant, in violation of the Fourth Amendment; (3) a warrant for the tape recording was obtained in violation of the federal Omnibus Crime Act; (4) a tape recording was used in violation of his protected marital privilege and invaded his constitutional right to confidential communication; (5) the change of ruling on a motion to dismiss the information violated the Fourteenth Amendment; (6) an inaccurate ruling regarding overt acts among conspirators resulted in a violation of due process; (7) the trial court erred in refusing to give an instruction regarding the need for unanimous agreement on each specific overt act; (8) the trial court's refusal to allow impeachment of the prosecution's witnesses with prior convictions and biases resulted in the violation of the Confrontation Clause; (9) the admission of prejudicially misleading photographs resulted in a violation of the right to a fair trial; (10) the trial court provided a misleading jury instruction regarding motive; and (11) the trial court provided an ambiguous instruction regarding admissions. J.A. 66-71.

for the Central District of California on May 5, 1997.[2] J.A. 35-47. As in the Weed Case, Ford contemporaneously filed a motion to stay the petition while he exhausted his state-court remedies on three claims that were not alleged in the petition. J.A. 48-49. On July 7, 1997, the magistrate judge issued an order finding that grounds four and seven of the petition were unexhausted, and gave Ford the option of dismissing the unexhausted claims and proceeding with only the exhausted claims, or suffering dismissal of the petition. Ford was to notify the court of his choice by July 25, 1997. Ford was also advised in that order that the court did not have the discretion to stay a mixed petition. J.A. 50-53. On July 28, 1997, Ford filed a document notifying the court that he wished to dismiss the petition without prejudice so that he could return to state court to exhaust his unexhausted claims. J.A. 54-55; *see also* Pet.

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2. In his first petition in the Loguercio Case, Ford alleged the following claims: (1) the trial court violated his Confrontation Clause rights when it quashed a subpoena duces tecum concerning a freelance writer who had taped an interview with the chief prosecution witness; (2) the defense was unconstitutionally burdened when the trial court excluded evidence of the writer's pecuniary interest; (3) the trial court erred in not allowing evidence of prosecutorial misconduct on the basis of instructions to the police to cease interviewing witnesses; (4) the trial court erred in not allowing the defense to present extrinsic evidence of third-party culpability; (5) the trial court's refusal to allow evidence about the rape of Ford's wife, tape recordings of the prosecution's key witness, and references to co-defendant Von Villas hampered the defense; (6) the trial court's failure to allow evidence of specific acts of misconduct to impeach the prosecution's key witness was error; (7) jury misconduct occurred when the jury foreman producing his own "spread sheet," which was then used by the entire jury; (8) the trial court's failure to suppress a general warrant lacking in specificity and particularity violated the Fourth and Fourteenth Amendments; (9) the prosecution's failure to preserve potentially favorable evidence resulted in the violation of due process; (10) the trial court prejudicially refused to instruct the jury about the inferences to be drawn against the prosecution for loss of evidence seized pursuant to a warrant; and (11) the trial court erroneously refused to instruct the jury that unanimity was required as to each overt act of each conspiracy alleged. J.A. 43-46.

App. E2. In a separate document, Ford also admitted his "possible failure to exhaust several issues." J.A. 56-57. The petition was accordingly dismissed without prejudice in a judgment entered on September 12, 1997. Pet. App. E7. Again, no appeal was filed. (The petitions filed in 1997 are collectively referred to hereafter as the First Petitions). *See* J.A. 4.

After the First Petitions were dismissed, Ford unsuccessfully sought relief in state court on his unexhausted claims in both cases. *See* Pet. App. A17-A18, A20.

On April 7, 1998, Ford returned to federal court and filed a second petition challenging his conviction in the Weed Case.[3] J.A. 84-103. In a judgment entered on June 30, 1998, the district court dismissed the petition with prejudice as untimely under AEDPA. Pet. App. C1-C9. A second petition challenging Ford's conviction in the Loguercio Case was filed the same day as the Weed petition, and likewise dismissed with prejudice as untimely in a judgment entered on July 27, 1998. (The petitions filed in 1998 are collectively referred to hereafter as the Second Petitions).[4] J.A. 104-20; *see also* Pet. App. B1-B8.

Ford appealed the dismissals of the Second Petitions. The Ninth Circuit consolidated the appeals and granted Ford's request for a certificate of appealability "on the question

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3. In his second petition in the Weed Case, Ford realleged all of the grounds from his first petition, and also alleged the following new grounds: (1) the prosecution erroneously used testimony obtained from a drugged co-conspirator; (2) the use of police agents to inculpate him violated the Fourth, Fifth, Sixth, and Fourteenth Amendments; (3) the prosecution misstated evidence, which violated the truth-in-evidence doctrine and his constitutional rights; (4) judicial misfeasance, abuse of discretion, and nonfeasance misdirected the jury and violated his rights to an impartial jury, due process, and equal protection; and (5) ineffective assistance of counsel. J.A. 93-102.

4. In his second petition in the Loguercio Case, Ford realleged all of the grounds from his first petition and also alleged that he was entitled to relief because his trial and appellate counsel were constitutionally ineffective. J.A. 113-19.

whether his federal habeas petitions were timely under AEDPA's one-year statute of limitations * * * *" Pet. App. A21.

In a published decision authored by Judge Reinhardt and joined by Judge Pregerson (with Judge Silverman dissenting), the majority held that, because "[t]he district court did not * * * inform Ford that it would not have the power to consider his motions to stay the [first] petitions unless he opted to amend them and dismiss the then-unexhausted claims," Ford's decision "to have his timely-filed federal habeas petitions dismissed without prejudice was an uninformed one * * * *" Pet. App. A13-A15. The majority also held that the district court erred by failing to advise Ford "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opted to dismiss the petitions 'without prejudice' and return to state court to exhaust all of his claims." Pet. App. A14. Finally, the majority held that, because the dismissals of the First Petitions were therefore "improper," the claims that were included in the First Petitions and then reasserted in the Second Petitions were not time-barred under AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." Pet. App. A15.

The majority vacated the district court's dismissal of the Second Petitions insofar as they contained claims originally raised in the First Petitions, and remanded those claims for reconsideration on the merits. Five claims newly raised in the second petition filed in the Weed Case were remanded for development of a factual record as to whether the statute of limitations should be equitably tolled. Finally, the majority affirmed the dismissal of two ineffective assistance of counsel claims raised for the first time in the second petition filed in the Loguercio Case. Pet. App. A40.

The Warden's petition for rehearing with suggestion for rehearing en banc in the Ninth Circuit was denied on May 15, 2003. Pet. App. A13.

SUMMARY OF ARGUMENT

I. This Court has long held that district courts must dismiss habeas petitions containing both exhausted and unexhausted claims. *Rose v. Lundy*, 455 U.S. 509, 522 (1981); *see also Duncan v. Walker*, 533 U.S. 167, 178-79 (2001). The Ninth Circuit in this case ignored the dictates of *Rose v. Lundy* by holding for the first time anywhere that the dismissal of a mixed petition is "improper" and constitutes "prejudicial" error, unless the district court informs a petitioner that it does "not have the power to consider [any] motion[] to stay the petition[] unless he opt[s] to amend [it] and dismiss the then-unexhausted claims." Pet. App. A14. "Boldly going where no court has gone before," Pet. App. A42 (Silverman, J., dissenting), the panel also required district courts to provide warnings about AEDPA's limitation period before dismissing a mixed petition. District courts must now advise a petitioner "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opt[s] to dismiss the petition[] 'without prejudice' and return to state court to exhaust all of his claims." Pet. App. A14.

The requirements imposed by the Ninth Circuit promote the goal of "stay and abeyance," a procedure that is inimical to both *Rose v. Lundy* and AEDPA. Under stay and abeyance, a mixed petition may be filed, unexhausted claims dismissed, and a stay of proceedings obtained for the purpose of exhausting the dismissed claims in state court. Once the dismissed claims are exhausted, they may be added to the stayed petition by way of amendment, and are deemed to "relate back" to the original petition, even though they otherwise would be time-barred. This is contrary to AEDPA, which "toll[s] the limitation period for the pursuit of state remedies [but] not during the pendency of applications for federal review * * * *" *Duncan v. Walker*, 533 U.S. at 180.

The Ninth Circuit's holding also undermines AEDPA's interest in finality "by creating more potential for delay in the adjudication of federal law claims." *Duncan v. Walker*, 533 U.S. at 180; *see also In re Blodgett*, 502 U.S. 236, 239 (1992). Stay and abeyance encourages the filing of mixed petitions and the subsequent addition of newly-exhausted but time-barred claims; it thus "increases the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Duncan v. Walker*, 533 U.S. at 180; *Slayton v. Smith*, 404 U.S. 53 (1971) (*per curiam*) (disapproving the use of stay and abeyance in federal habeas proceedings).

Stay and abeyance, with its attendant delay of federal proceedings, contravenes this Court's admonition that federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976). In addition, it "fails to account sufficiently for AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan v. Walker*, 533 U.S. at 181 (citing 28 U.S.C. §§ 2254(b), 2254(e)(2), & 2264(a)). And, any advisements regarding AEDPA's limitation period would unduly burden district courts. If allowed to stand, the Ninth Circuit's decision would render AEDPA's limitation period virtually irrelevant, and reduce district courts to "a jurisdictional parking lot." *Sterling v. Scott*, 57 F.3d 451, 454 (CA5 1995).

II. In holding that the claims that were included in the First Petitions and reasserted in the Second Petitions were not time-barred under AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions" pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, Pet. App. A15, the Ninth Circuit erroneously concluded that the relation-back doctrine applies to habeas proceedings.

Under Rule 11 of the Rules Governing Section 2254 Cases, "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when

appropriate, to petitions filed under these rules." At the time of its enactment, Rule 15(c) did not apply to habeas proceedings. As the Advisory Committee Notes to Rule 15(c) state, "[r]elation back is intimately connected with the policy of the statute of limitations." *See Harris v. Nelson*, 394 U.S. 286, 295 (1969) (the drafters' intent with respect to the 1938 creation of the Federal Rules of Civil Procedure "indicates nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings"). Until the enactment of AEDPA, however, there was no statutory limitation period governing habeas corpus proceedings. Thus, to apply Rule 15(c) to habeas corpus cases would be "inconsistent" with "the practice in such proceedings." Fed. R. Civ. P. 81(a)(2); *see also Harris v. Nelson*, 394 U.S. at 294 ("Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense").

Even assuming the relation-back doctrine applies to habeas proceedings, the majority's interpretation of the doctrine would in effect nullify the AEDPA limitation period. Rule 15(c) provides that an amendment of a pleading relates back to the date of the original pleading when "relation back is permitted by the law that provides the statute of limitations applicable to the action, or [¶] * * * the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading * * * *" Building upon the errors discussed previously, the majority held that, because the dismissals of the First Petitions were "improper," the claims that were included in the First Petitions and then reasserted in the Second Petitions were not time-barred under AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." Pet. App. A15.

No court (other than *Ford*) has ever concluded that an otherwise untimely habeas petition relates back to a prior habeas petition in a proceeding that was dismissed and is no longer pending. As the Fifth Circuit has cogently observed, such an

approach is "impractical," because it "would eviscerate the AEDPA limitations period and thwart one of AEDPA's principal purposes * * * *" *Graham v. Johnson*, 168 F.3d 762, 780 (CA5 1999). The Ninth Circuit's interpretation of the relation-back doctrine is inconsistent with habeas corpus practice and amounts to a subversion of AEDPA's limitation period.

ARGUMENT

I.

THE NINTH CIRCUIT ERRED IN HOLDING THAT THE DISMISSAL OF A MIXED PETITION IS IMPROPER ABSENT ADVICE AND INFORMATION DESIGNED TO EFFECTUATE STAY AND ABEYANCE

This Court has steadfastly held for over twenty years that "a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief." *Rose v. Lundy*, 455 U.S. at 522. Accordingly, "a district court *must* dismiss habeas petitions containing both unexhausted and exhausted claims." *Id.* (emphasis added); *see also id.* at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error"); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims"); *Castille v. Peoples*, 489 U.S. 346, 349 (1989) ("Respondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of the federal claims"); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring) ("In *Rose v. Lundy*, * * * the Court announced that a habeas petition containing exhausted and unexhausted

claims must be dismissed"); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982) ("If [an unexhausted] claim were present, *Rose v. Lundy*, * * * would mandate dismissal of the entire petition").

In *Duncan v. Walker*, 533 U.S. at 167, this Court reaffirmed those well-settled principles in a post-AEDPA habeas proceeding. As stated by the Court, "[t]he exhaustion requirement [set forth in AEDPA] ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Id.* at 178-79. *Duncan* also noted that "[t]olling the limitation period for a federal habeas petition that is dismissed without prejudice would * * * create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves. We do not believe that Congress designed the statute in this manner." *Id.* at 180.

The Ninth Circuit in this case ignored the foregoing authorities, and held for the first time anywhere that the dismissal of a mixed petition is "improper" and constitutes "prejudicial" error, unless the district court informs a petitioner that it does "not have the power to consider [any] motion[] to stay the petition[] unless he opt[s] to amend [it] and dismiss the then-unexhausted claims." Pet. App. A14. In another first, the panel also required district courts to provide warnings about AEDPA's limitation period before dismissing a mixed petition; district courts must now advise a petitioner "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opt[s] to dismiss the petition[] 'without prejudice' and return to state court to exhaust all of his claims." Pet. App. A14.

The advisements required by the Ninth Circuit are designed to encourage the stay and abeyance of mixed petitions, a procedure that contravenes *Duncan v. Walker* by permitting AEDPA's limitation period to be tolled during the pendency of a *federal* habeas proceeding. Under stay and abeyance, a mixed federal habeas petition may be filed, unexhausted claims

dismissed, and a stay of the proceeding obtained for the purpose of exhausting the dismissed claims in state court. Once the dismissed claims are exhausted, they may be added to the stayed petition by way of amendment, and are deemed to relate back to the original petition, even where exhaustion was commenced *after* the expiration of AEDPA's limitation period. As such, stay and abeyance runs afoul of this Court's pronouncements that AEDPA's limitation period is tolled only during "the pursuit of state remedies *and not during the pendency of applications for federal review* * * * *" *Duncan v. Walker*, 533 U.S. at 180 (emphasis added).

This case falls squarely within the confines of *Rose v. Lundy* and *Duncan v. Walker*. Ford filed mixed First Petitions and refused the district court's invitation to dismiss his unexhausted claims. Faced with that situation, "the district court * * * did exactly what it was supposed to do: It dismissed Ford's mixed [first] petition[s] without prejudice." Pet. App. A40 (Silverman, J., dissenting).

The majority's holding conflicts with *Rose v. Lundy* and *Duncan v. Walker*, promotes the improper goal of stay and abeyance, serves no purpose other than to subvert the design and intent of AEDPA, and unduly burdens district courts.

A. The Ninth Circuit's Procedure Conflicts With The Total Exhaustion Rule Of *Rose v. Lundy*, Which AEDPA Retained

1. The requirement that a habeas petitioner exhaust his remedies prior to seeking relief in federal court is a long-standing statutory mandate, founded upon principles of federalism and comity, and designed to ensure the prompt resolution of properly-brought claims. In *Rose v. Lundy*, 455 U.S. at 509, this Court noted that the prior version of 28 U.S.C. § 2254 "expressly require[d] the prisoner to exhaust 'the remedies available in the courts of the State,'" *id.* at 519, and that, consequently, "a district court must dismiss habeas

petitions containing both unexhausted and exhausted claims." *Id.* at 522. In addressing the lower court's failure to enforce that requirement, this Court stated:

> * * * [O]ur holdings today reflect our interpretation of a federal statute on the basis of its language and legislative history, and consistent with its underlying policies. There is no basis to believe that today's holdings will "complicate and delay" the resolution of habeas petitions * * *, or will serve to "trap the unwary *pro se* prisoner." * * * On the contrary, our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court. * * *
>
> Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. To the extent that the exhaustion requirement reduces piece-meal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

Id. at 519-20.

A plurality nevertheless recognized that a total exhaustion rule was not without consequences: "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." *Rose v. Lundy*, 455 U.S. at 520-21 (plurality op.).

AEDPA retains the exhaustion requirement of its predecessor statute. Under 28 U.S.C. § 2254(b)(1)(A), habeas relief is likewise prohibited unless "the applicant has exhausted the remedies available in the courts of the State * * * *" AEDPA departs from prior habeas jurisprudence, however, by imposing a one-year limitation period under § 2244(d)(1) to "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Subsection (d)(2) provides tolling of the limitation period for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending * * * *"

In *Duncan v. Walker*, this Court described the interplay of those provisions as follows:

> * * * The exhaustion rule promotes comity in that "'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'" * * *
>
> The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. * * * This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.
>
> The tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period. Section 2244(d)(2) promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. At the same time, the provision limits the harm to the interest in finality by according tolling effect only to "properly filed application[s] for State post-conviction or other collateral review."
>
> By tolling the limitation period for the pursuit of state remedies and not during the pendency of applications for federal review, § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts. * * *

Duncan v. Walker, 533 U.S. at 179-80.

Dismissal of mixed petitions *remains* the only proper course of action under *Rose v. Lundy*, notwithstanding AEDPA's newly-imposed limitation period. Indeed, because *Rose v. Lundy* was decided in 1981, and because AEDPA — which was enacted in 1996 — retains the statutory exhaustion requirement interpreted by that decision, Congress presumably intended *Rose v. Lundy* to apply to post-AEDPA cases. *See Williams v. Taylor*, 529 U.S. 420, 434 (2000) ("When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary"); *see also United States v. Sisson*, 399 U.S. 267, 297-98 (1970) ("[T]he axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed"). Stated somewhat differently, the "design" of AEDPA, *Duncan v. Walker*, 533 U.S. at 180, is consistent with *Rose v. Lundy*'s total exhaustion rule. *See* 141 Cong. Rec. S7847 (daily ed. June 7, 1995) (statement of Sen. Specter) ("[T]his bill does not abolish [the] exhaustion requirement. Unli[k]e the resolution of this issue in the 1990 legislation, which passed the Senate, which eliminated the requirement of exhaustion of State remedies, that provision is not in this bill").

Exhaustion is not a particularly difficult concept for a petitioner to grasp. As this Court noted over twenty years ago:

> * * * §§ 2254(b), (c) provide[] a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court. Just as *pro se* petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement.

Rose v. Lundy, 455 U.S. at 520.

In sum, AEDPA encourages the filing of exhausted federal habeas petitions by tolling the limitation period for properly-filed state petitions. "Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible." *Duncan v. Walker*, 533 U.S. at 181 (emphasis in original). To countenance anything less than complete exhaustion would be "out of step with this design," "result[ing] in "[a] diminution of statutory incentives to proceed first in state court[, and] * * * the risk of the very piece-meal litigation that the exhaustion requirement is designed to reduce." *Id.* at 180.

The possibility that a refiled petition might be time-barred does not dictate a contrary result.[5/] Congress has afforded petitioners ample time — one year after the finality of their

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5. At least one court of appeals has suggested that a petitioner may avoid that consequence by simultaneously filing a "protective" petition in state court containing claims that may be unexhausted. *See Akins v. Kenney*, 341 F.3d 681, 685-86 (CA8 2003). Under § 2244(d)(2), the state-court filing would toll AEDPA's limitation period, thereby allowing the petitioner to refile in federal court in the event his initial federal petition is dismissed as unexhausted. *See id.* Of course, dismissal may be avoided by filing a fully-exhausted petition in the first place.

state-court convictions — to exhaust their claims and file a federal habeas petition. Moreover, "[s]ection 2244(d)(2) * * * [does] not toll the limitation period during the pendency of * * * [a] federal habeas petition." *Duncan v. Walker*, 533 U.S. at 181-82. Therefore, even if Ford had elected to dismiss the unexhausted claims from the First Petitions, the dismissed claims would have been time-barred upon refiling. *Cf. Rose v. Lundy*, 455 U.S. at 520 (plurality op.) ("By invoking this procedure [dismissal of unexhausted claims], * * * the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. * * * Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions"). And, Ford's "[1998] federal habeas petition[s] contained claims different from those presented in his [1997] petition[s]," *Duncan v. Walker*, 533 U.S. at 181, rendering the consideration of the Second Petitions inappropriate under any circumstances. *See* J.A. 35-47, 58-72, 84-103, 104-20.

2. It may be argued, as suggested by the plurality in *Rose v. Lundy*, that unexhausted claims should be deleted from a mixed petition in lieu of complete dismissal. *See* 455 U.S. at 520-21 (plurality op.). But even if such "purging" were authorized, the Ninth Circuit's prescribed advisements promoting stay and abeyance would remain inconsistent with this Court's policy of "speedy" resolution of federal habeas claims, as reflected in *Rose v. Lundy*. Stay and abeyance allows a habeas proceeding to be placed "on hold" indefinitely pending a petitioner's pursuit of state-court remedies. *See In re Blodgett*, 502 U.S. at 239 ("The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decision[] in *Rose v. Lundy*").

Stay and abeyance also frustrates *Rose v. Lundy* in other ways. Although *Rose* contemplated outright dismissal of a mixed petition, or perhaps the litigation of a petition purged of unexhausted claims, stay and abeyance encourages the filing of mixed petitions and eschews dismissal without obtaining the benefit of expeditious federal review of the exhausted claims. Instead, under stay and abeyance, the federal proceeding is "held hostage" in favor of unexhausted claims that, under *Rose v. Lundy*, should play no role in federal review.

B. Stay And Abeyance Subverts The Design And Intent Of AEDPA's Limitation Period

The Ninth Circuit's stay and abeyance procedure is also contrary to the limitation period of AEDPA, which likewise contemplates the expeditious resolution of habeas claims. As set forth previously, 28 U.S.C. § 2244(d)(1) imposes a one-year limitation period for "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Subsection (d)(2) provides tolling for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending * * * *" Section 2244, as explained in *Duncan v. Walker*, does not allow tolling of the limitation period during the pendency of a federal petition. 533 U.S. at 181-82. Stay and abeyance, however, illegitimately affords such tolling by other means.

In a series of cases beginning with *Fetterly v. Paskett*, 997 F.2d 1295 (CA9 1993), the Ninth Circuit institutionalized a practice whereby a mixed habeas petition may be filed, unexhausted claims dismissed, and a stay of the proceeding obtained for the purpose of exhausting the dismissed claims in state court. Once the dismissed claims are exhausted, they may be added to the stayed petition by way of amendment, and are deemed to relate back to the original petition for timeliness purposes. *See, e.g., James v. Pliler*, 269 F.3d 1124, 1126-27

(CA9 2001); *James v. Giles*, 221 F.3d 1074, 1078 (CA9 2000); *Calderon v. District Court (Taylor)*, 134 F.3d 981, 989 (CA9 1998); *see also Kelly v. Small*, 315 F.3d 1063, 1070 (CA9 2003); *Neuschafer v. Whitley*, 860 F.2d 1470, 1472 n.1 (CA9 1988); *but see Taylor*, 134 F.3d at 989 (holding that *Neuschafer* did not apply to cases involving mixed federal habeas petitions).

The Ninth Circuit's practice is designed to bypass the limitation period of AEDPA, which "quite plainly serves the well-recognized interest in the finality of state court judgments." *Duncan v. Walker*, 533 U.S. at 179 (citing *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998)). As such, stay and abeyance "undermine[s] the interest in finality by creating more potential for delay in the adjudication of federal law claims." *Duncan v. Walker*, 533 U.S. at 180. Indeed, it "increase[s] the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.*; *see also Carey v. Saffold*, 536 U.S. 214, 226 (2002) (discussing AEDPA's "statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims"). No purpose is served by a stay of federal habeas proceedings except to defy congressional intent and subvert AEDPA's limitation period. An open-ended stay to allow petitioners to exhaust their state remedies would unduly delay the ultimate determination of the issues and reward those, like Ford, who disregard the plain language of AEDPA and file admittedly mixed petitions.

This Court long ago disapproved of the practice of stay and abeyance in habeas proceedings. In *Slayton v. Smith*, 404 U.S. at 53, the district court summarily dismissed a mixed petition. On appeal, the Fourth Circuit agreed that state remedies had not been exhausted, but vacated the district court's judgment and

remanded for further proceedings with instructions to stay the case until the petitioner had sought relief in state court. *Id.* In rejecting that procedure, this Court held:

> The Court of Appeals' form of "abstention" is perhaps technically consistent with the statutory prohibition against issuing the writ where state remedies have not been exhausted. 28 U.S.C. § 2254. But, having determined that state remedies had not been exhausted, the Court of Appeals would have better served the policy of the statute had it avoided any implication as to the merits of so delicate a subject. Further, absent special circumstances, cf. *Nelson v. George*, 399 U.S. 224 (1970), *Wade v. Wilson*, 396 U.S. 282 (1970), rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies.

Id. at 53-54.

Stay and abeyance has an even greater potential for mischief in capital federal habeas cases, where the incentive to "obtain[] speedy federal relief," *Rose v. Lundy*, 455 U.S. at 520 (plurality op.), is largely absent. *See Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, * * * and 'to further the principles of comity, finality, and federalism' * * * *") (quoting *Williams v. Taylor*, 529 U.S. at 436); *see also* 141 Cong. Rec. S7804 (daily ed. June 7, 1995) (statement of Sen. Specter) ("[I]n the current context in which habeas corpus appeals now run for as long as a couple of decades, the deterrent effect of capital punishment has been virtually eliminated").

Stay and abeyance contravenes this Court's admonition that federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. at 817-18; *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992); *In re Blodgett*, 502 U.S. at 239-40. If allowed to stand, the majority's holding would render AEDPA's limitation period virtually irrelevant, and reduce district courts to what one appellate court has aptly described as "a jurisdictional parking lot." *Sterling v. Scott*, 57 F.3d at 454.

C. The Ninth Circuit's Advisement Requirement Regarding AEDPA's Limitation Period Is Unduly Burdensome, Will Breed New Disputes, And Threatens To Blur The Distinction Between Impartial Decision-Making And Advocacy

As explained previously, the Ninth Circuit's advisement requirements regarding stay and abeyance and AEDPA's limitation period are inappropriate, because they promote a procedure that runs afoul of *Rose v. Lundy* and AEDPA.

With respect to the limitation-period advisement, moreover, the Ninth Circuit's requirement is unduly burdensome and risks further disputes where subsequent developments reveal the district court's admonitions to have been incorrect. Rule 47(b) of the Federal Rules of Appellate Procedure provides that "[a] court of appeals may regulate practice in a particular case in any manner consistent with federal laws, these rules, and local rules of the circuit. * * *" In *United States v. Hasting*, 461 U.S. 499, 505-06 (1983), this Court stated:

> "[G]uided by considerations of justice," *McNabb* v. *United States*, 318 U.S. 332, 341 (1943), and in the exercise of supervisory powers, federal courts may,

within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights, *McNabb*, *supra*, at 340; *Rea* v. *United States*, 350 U.S. 214, 217 (1956); to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, *McNabb*, *supra*, at 345; *Elkins* v. *United States*, 364 U.S. 206, 222 (1960); and finally, as a remedy designed to deter illegal conduct, *United States* v. *Payner*, 447 U.S. 727, 735-736, n. 8 (1980).

Id. at 505.

The majority's advisement requirement in this case, however, does not "give appropriate — if, indeed, any — weight to these relevant interests." *United States v. Hasting*, 461 U.S. at 507. As the dissent below observed, the majority "fails to take account of the fact that the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired." Pet. App. A42 (Silverman, J., dissenting). Other problems abound:

> * * * Numerous factors can affect a petitioner's decision to delete unexhausted claims and proceed with an amended petition, rather than accept dismissal without prejudice so that unexhausted claims can be pursued in state court. For example, the meritoriousness of the unexhausted claims is an extremely important factor; so is the fact that the failure-to-exhaust might foreclose those claims forever. The availability of key witnesses is another factor. The statute of limitations is only one element in the equation, and a fact-intensive one at that. Leaving aside the question of the proper role of the

> court as a neutral arbiter, the district court simply is in no position to identify all of the considerations that pertain. I respectfully suggest that it is the office of the court to fairly and impartially decide the case before it, not to act as the petitioner's paralegal.

Pet. App. A43 (Silverman, J., dissenting).

Indeed, depending upon matters not before the district court, any advice regarding AEDPA's limitation period might prove to be wrong and mislead the petitioner into a disadvantageous course of action. This Court has never required any warnings or advisements regarding AEDPA's limitation period, nor has it ever held that their absence renders the dismissal of a mixed petition erroneous. *See Duncan v. Walker*, 533 U.S. at 178-79; *Rose v. Lundy*, 455 U.S. at 522. The majority's holding imposes an unwarranted burden upon district courts, creates the potential for misadvisement, and in effect compels district courts to act as advocates.

D. The Ninth Circuit Erroneously Concluded That The District Court's Dismissal Of The Mixed First Petitions Was Improper

Even assuming any stay and abeyance advisements would have been appropriate in this case, the advisements actually given were sufficient. The district court generously allowed Ford to amend the First Petitions to delete the unexhausted claims, rather than dismiss the entire petitions. Ford declined, however, to take up that offer. *See* Pet. App. D1-D2, E2-E3; *see also* J.A. 56-57, 75-78. As pointed out by the dissent below, "[t]he district court correctly offered [Ford] the option of either amending the petition[s] by deleting the unexhausted claims and proceeding with only those that had been exhausted, or suffering the dismissal of his entire petition[s] without prejudice." Pet. App. A40 (Silverman, J., dissenting). The district court dismissed the First Petitions only after Ford failed to state a

choice in the Weed Case, and elected to dismiss his petition in the Loguercio Case. Pet. App. D2, D5, E2, E7.

Although the dismissals occurred after the expiration of AEDPA's limitation period, *see* Pet. App. D5, E7, tolling ("equitable" or otherwise) would not be warranted, because Ford was given the option of dismissing his unexhausted claims as an alternative to complete dismissal. *Compare Duncan v. Walker*, 533 U.S. at 184 (Stevens, J., concurring) ("[E]quitable considerations may make it appropriate for federal courts to * * * toll[] AEDPA's statute of limitations for unexhausted federal habeas petitions"), *with Rose v. Lundy*, 455 U.S. at 520 (plurality op.) (["A petitioner] can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims"). Nothing more was required. *Cf. Castro v. United States*, 124 S. Ct. 786, 789-93 (2003) (district court *unilaterally* recharacterized petitioner's motion in § 2255 case without providing advisements regarding the potential consequences of such recharacterization).

II.

THE APPLICATION OF FEDERAL RULE OF CIVIL PROCEDURE 15(c) TO HABEAS PROCEEDINGS WOULD IN EFFECT NULLIFY AEDPA'S LIMITATION PERIOD

The Ninth Circuit also held that, because the dismissals of the First Petitions were "improper," the claims that were included in the First Petitions and then realleged in the Second Petitions were not time-barred under AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." Pet. App. A15. Application of the relation-back doctrine set forth in Rule 15(c) of the Federal Rules of Civil Procedure, however, would be inconsistent with congressional understanding, as well as the clear design of AEDPA. The panel's interpretation of Rule 15(c) ignores legislative intent,

circumvents AEDPA's limitation period, and conflicts with the decisions of every other court to have considered this issue — including three other Ninth Circuit panels.

A. The Relation-Back Doctrine Does Not Apply To Habeas Proceedings

The Federal Rules of Civil Procedure (FRCP) do not uniformly apply to habeas corpus cases. Even though habeas corpus proceedings are characterized as "civil" (as opposed to criminal) in nature, *Browder v. Dir., Dep't of Corrs.*, 434 U.S. 257, 265 n.9, 269 (1978); *Fisher v. Baker*, 203 U.S. 174, 181 (1906), this Court has observed that such a "label is gross and inexact." *Harris v. Nelson*, 394 U.S. at 293-94.

FRCP 81(a)(2) provides that the FRCP applies to habeas corpus cases "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Similarly, Rule 11 of the Rules Governing Section 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Rule 11, foll. 28 U.S.C. § 2254. Indeed, the Advisory Committee Notes to Rule 11 state that "Rule 11 permits application of the civil rules only when it would be appropriate to do so," and warn that courts should not "rigidly apply [FRCP] rules which would be inconsistent or inequitable in the overall framework of habeas corpus."

The question of whether application of a particular FRCP rule to a habeas corpus case would be consistent with habeas corpus practice is easily resolved when a particular habeas corpus practice is specifically set forth in a statute or rule. Thus, in *Browder v. Dir., Dep't of Corrs.*, this Court concluded that Rule 12(b)(6) of the FRCP, which allows the filing of a motion to dismiss for failure to state a claim upon which relief may be granted, does not apply in habeas corpus cases because "[t]he procedure for responding to the application for a writ of habeas

corpus * * * is set forth in the habeas corpus statutes, and under Rule 81(a)(2), takes precedence over the Federal Rules."[6] 434 U.S. at 269 n.14.

Likewise, in *Pitchess v. Davis*, 421 U.S. 482 (1975) (*per curiam*), this Court held that FRCP Rule 60(b)(6), which provides for relief from final judgment, does not apply in the habeas corpus context. As this Court observed:

> Respondent failed to exhaust available state remedies on the claim which formed the basis for the unconditional writ, and he is entitled to no relief based upon a claim with respect to which state remedies have not been exhausted. Neither rule 60(b), 28 U.S.C. § 2254, nor the two read together, permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court. * * *

Id. at 490.

Harris v. Nelson is perhaps most directly on point. In *Harris*, this Court was faced with the question of whether FRCP Rule 33, which concerns the use of interrogatories for discovery purposes in civil cases, applies to habeas corpus proceedings. Initially, the *Harris* Court noted that habeas corpus proceedings were "unique," and that "[h]abeas corpus practice in the federal courts has conformed with civil practice only in a general sense." 394 U.S. at 294. This Court further observed that the drafters' intent with respect to the 1938 creation of the FRCP "indicates nothing more than a general and nonspecific understanding that the rules would have *very limited* application to habeas corpus proceedings." *Id.* at 295 (emphasis added).

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6. This Court did find, however, based upon "the settled conformity of habeas corpus and other civil proceedings with respect to time limits on postjudgment relief," that Rules 52 and 59 applied to habeas proceedings. *Browder v. Dir., Dep't of Corrs.*, 434 U.S. at 271.

"At the very least, it is clear that there was no intention to extend to habeas corpus, as a matter of right, the broad discovery provisions which, even in ordinary civil litigation, were 'one of the most significant innovations' of the new rules. * * *" *Id.*

This Court concluded that the fundamental differences between ordinary civil actions and habeas corpus proceedings dictated that certain discovery tools provided for in the FRCP should not apply in habeas proceedings:

> * * * [I]t is difficult to believe that the draftsmen of the Rules or Congress would have applied the discovery rules without modification to habeas corpus proceedings because their specific provisions are ill-suited to the special problems and character of such proceedings. For example, Rule 33, * * * provides for written interrogatories to be served by any party upon any "adverse party." As the present case illustrates, this would usually mean that the prisoner's interrogatories must be directed to the warden although the warden would be unable to answer from personal knowledge questions relating to petitioner's arrest and trial. Presumably the warden could solicit answers from the appropriate officials and reply "under oath," as the rule requires; but the warden is clearly not the kind of "adversary party" contemplated by the discovery rules, and the result of their literal application would be to invoke a procedure which is circuitous, burdensome, and time consuming.

Harris v. Nelson, 394 U.S. at 296.

In sum, this Court held that Rule 33 does not apply to habeas corpus proceedings because, "on conventional principles of statutory instruction, [it could not be] properly conclude[d] that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or

the congressional understanding." *Harris v. Nelson*, 394 U.S. at 298. Similarly, there is nothing in AEDPA, congressional intent, congressional understanding of federal habeas practice, or even Rule 15(c) itself, to suggest that the relation-back doctrine should apply to habeas proceedings.

1. Application Of Rule 15(c) To Habeas Proceedings Would Be Inconsistent With The Design And Intent Of AEDPA

Rule 15(c) applies only to proceedings that are governed by a statute of limitations. *See* Fed. R. Civ. P. 15(c) (Advisory Committee Notes) ("Relation back is intimately connected with the policy of the statute of limitations"); *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986) (applying relation-back doctrine to New Jersey statute of limitations for libel actions); *see also Percy v. San Francisco Gen. Hosp.*, 841 F.2d 975, 979 (CA9 1988). The rationale for the relation-back doctrine may be found in the purpose served by statutes of limitation governing ordinary civil causes of action, which is to prevent the bringing of "stale" claims. As this Court has stated:

> Statutes of limitation, * * * in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R.R. Tels. v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944); *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost") *see also Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1523 (CA9 1987) (quoting *Order of R.R. Tels.*); *cf. Singletary v. Pennsylvania Dep't of Corrs.*, 266 F.3d 186, 193 (CA3 2001) (purpose of relation back is to ameliorate strict application of the statute of limitation); *Hill v. Shelander*, 924 F.2d 1370, 1377 (CA7 1991) (purpose of relation back is to permit amendments to pleadings when the statute of limitation has expired).

In contrast, prior to AEDPA, there was no statute of limitation for habeas filings; until the enactment of § 2244(d)(1), Rule 15(c) did not govern the filing of habeas petitions because there was no need for newly-presented claims to relate back to a previous filing. As such, "it is difficult to believe that the draftsmen of the Rules or Congress would have applied [Rule 15(c)] without modification to habeas corpus proceedings." *See Harris v. Nelson*, 394 U.S. at 296.

Moreover, AEDPA's limitation period serves an entirely different purpose from that of statutes of limitation governing ordinary civil causes of action. The limitation period, and the remainder of the provisions of AEDPA, were designed to prevent federal habeas petitioners from unduly delaying the finality of their state court judgments. As this Court has noted, "'[t]he interest in leaving concluded litigation in a state of repose,'" free from "'further judicial revision,'" has played a defining role in shaping the scope of the writ. *Teague v. Lane*, 489 U.S. at 306 (O'Connor, J.); *accord Butler v. McKeller*, 494 U.S. 407, 412 (1990); *see also Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (the distinction between direct and collateral review of state criminal judgments has become so prominent that it now "resounds throughout habeas jurisprudence").

Section 2254(e) provides further indication of Congress' intent to expedite the resolution of habeas corpus cases. Now, if a petitioner has "failed to develop the factual basis of a claim in State court proceedings, the [federal] court shall not hold an evidentiary hearing on the claim" unless certain conditions are

met.[7] And, while de novo review may have once been the standard generally employed for purposes of habeas corpus, *see Norris v. Risley*, 878 F.2d 1178, 1180 (CA9 1989), that is no longer the case under amended § 2254(d). Absent enumerated exceptions, federal courts must defer to state court adjudications of federal constitutional claims when those claims are presentedto the federal courts on habeas corpus.[8] *See Williams v. Taylor*, 529 U.S. 362, 412 (2000).

Accordingly, in providing for a one-year limitation period following the finality of a state-court conviction (plus any tolling as set forth in AEDPA), Congress was not concerned with the possibility that habeas petitioners might present stale claims, that witnesses' memories might fade, or that evidence might be lost or destroyed; Rule 9(a) of the Rules Governing Section 2254 Cases addresses those potential problems. Instead, the one-year limitation period was enacted for the simple purpose of ensuring that federal habeas corpus cases proceed in

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7. Under AEDPA, a habeas petitioner is entitled to an evidentiary hearing only where:

> (A) the claim relies on (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

8. Deference is required to state court adjudications of federal claims unless that adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1), (2).

a timely fashion. By the time a would-be habeas petitioner reaches the federal court, a full state investigation, trial, appellate — and, in many cases, habeas — review will likely have taken place. Application of the relation-back doctrine would be inconsistent with AEDPA's design to expedite the federal habeas process.

The legislative history of AEDPA reflects that design. On March 24, 1995, Senator Arlen Specter (Pennsylvania) introduced S. 623, a bill seeking federal habeas corpus reform. 141 Cong. Rec. S4590-96 (daily ed. Mar. 24, 1995). Senator Specter explained that reform was sorely needed because "[t]he great writ of habeas corpus" was being "applied in a crazy-quilt manner with virtually endless appeals that deny justice to victims and defendants alike, making a mockery of the judicial system." *Id.* at S4591. Senator Orrin Hatch (Utah), co-sponsor of S. 623, likewise emphasized the need for the bill. He warned that meaningful reform was necessary to "stop repeated assaults upon fair and valid State convictions through spurious petitions filed in Federal court" and described the bill as an means of protecting "constitutional guarantees of freedom from illegal punishment, while at the same time ensuring that lawfully convicted criminals will not be able to twist the criminal justice system to their own advantage." *Id.* at S4596. The Specter/Hatch habeas corpus reform bill was subsequently passed by the Senate as Title VI of S. 735, the Comprehensive Terrorism Prevention Act. 141 Cong. Rec. S7803, S7857, S7868-71 (daily ed. June 7, 1995).

On March 13, 1996, Representative Henry Hyde (Illinois) presented H.R. 2703, the Comprehensive Antiterrorism Act of 1995, to the full House for debate. 142 Cong. Rec. H2137 (daily ed. Mar. 13, 1996). Like S. 735, H.R. 2703 contained provisions for habeas corpus reform, including a limitation period. And like Senators Specter and Hatch, Representative Hyde explained that such reform was necessary to preempt the

"abuse of habeas corpus" by convicted capital murderers whose sole aim is to "stretch it out." 142 Cong. Rec. H2182, H2184, H2249 (daily eds. Mar. 13-14, 1996).

Representative Bill McCollum (Florida), a co-proponent of the bill, expressed a similar sentiment, explaining that, by allowing death row inmates into federal court "one time and one time only," the bill would end "the seemingly endless appeals" and "15- and 20-year delays of carrying out * * * the death penalty." 142 Cong. Rec. H2143 (daily ed. Mar. 13, 1996). And Representative Bob Barr (Georgia), yet another proponent of H.R. 2703, described the bill as the means to "stop the endless, pointless, and abusive delays currently available to those in our State court system to avoid the carrying out of a death sentence," by placing "reasonable time limits on the use of the Federal habeas corpus provision." *Id.* at H2168. As Representative Barr emphasized, "There have to be reasonable limits. There has to be a reasonable balance, else it will be an unreasonable system and wreak havoc on the American people as we have seen decade after decade." *Id.* The House of Representatives subsequently passed S. 735 as amended by H.R. 2703. 142 Cong. Rec. H2267, H2288, H2304 (daily ed. Mar. 14, 1996).

Thereafter, both Houses of Congress adopted the Conference Report on S. 735, renamed the Antiterrorism and Effective Death Penalty Act of 1996. H.R. Conf. Rep. No. 104, 104th Cong., 2d Sess. (1996); 142 Cong. Rec. S3477 (daily ed. Apr. 17, 1996); 142 Cong. Rec. H3618 (daily ed. Apr. 18, 1996). The Conference Report explains that Title I of AEDPA "incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. No. 104, reprinted in 1996 U.S.C.C.A.N. 944.

On April 24, 1996, President Clinton signed AEDPA into law, acknowledging that "[f]or too long, and in too many cases, endless death row appeals have stood in the way of justice being served," and expressing hope that AEDPA would facilitate his

long-standing efforts to "streamline Federal appeals for convicted criminals sentenced to the death penalty." Pub. L. No. 104-132; 1996 U.S.C.C.A.N. (110 Stat.) 961-1.

But the purpose of habeas corpus reform was not limited to the death penalty arena. *See* 141 Cong. Rec. S7803 (daily ed. June 7, 1995) (statement of Sen. Specter) ("[It is] time to move ahead with legislation to reform habeas corpus in all cases"). The provisions of Chapter 153 of Title 28 of the United States Code apply to *all* habeas corpus cases, and those provisions illustrate with utter clarity Congress' intent to expedite the habeas corpus process in capital and non-capital cases alike. *See Woodford v. Garceau*, 538 U.S. at 206.

2. Application Of Rule 15(c) To Habeas Proceedings Would Improperly Permit The Consideration of Time-Barred Claims

Application of the relation-back doctrine to habeas proceedings would also improperly permit the consideration of newly-exhausted claims that were pursued in state court after the expiration of AEDPA's limitation period. Under § 2244(d)(2), tolling of AEDPA's limitation period occurs while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending * * * *" Tolling does not occur, however, during the pendency of federal habeas proceedings. *See Duncan v. Walker*, 533 U.S. at 180. The reason for that distinction is clear: "[by] tolling the limitation period for the pursuit of state remedies and not during the pendency of applications for federal review, § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts * * * *" *Id.*

Relation back, on the other hand, provides a powerful incentive for litigants to do the very opposite. Indeed, relation back would validate a process consisting of the filing of a mixed petition, the dismissal of unexhausted claims, and the eventual

consideration of such claims following exhaustion, even where the commencement of exhaustion proceedings occurred *after* the expiration of AEDPA's limitation period; the filing of a *federal* habeas petition would, for all intents and purposes, toll the limitation period. *Compare Duncan v. Walker*, 533 U.S. at 180 ("Tolling the limitation period for a federal habeas petition * * * would * * * create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves. We do not believe that Congress designed the statute in this manner").

Thus, as long as a habeas petitioner files a timely petition containing just *one* exhausted claim, any unexhausted claims alleged in the petition would also be considered timely (even if the eventual pursuit of state remedies was *not*) through relation back. Application of the relation-back doctrine under such circumstances would result in the "tail wagging the dog."[9] *Williams v. United States*, 401 U.S. 646, 659 (1971); *see also Rosales-Garcia v. Holland*, 322 U.S. 386, 420 (CA6 2003) (Boggs, J., dissenting) (discussing restrictions on the detention of removable aliens under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

B. Even Assuming The Relation-Back Doctrine Applies To Habeas Proceedings, Application Of The Doctrine In The Manner Employed By The Ninth Circuit Was Improper

As set forth previously, the majority in this case held that because the dismissals of the First Petitions were "improper," the claims that were included in the First Petitions and then

9. Moreover, some courts have permitted almost limitless amendment and relation back by defining the terms "conduct, transaction, or occurrence," as set forth in Rule 15(c), at a meaningless level of generality, such as "[the] criminal proceeding." *Compare Ellzey v. United States*, 324 F.3d 521, 525-27 (CA7 2003) *with Davenport v. United States*, 217 F.3d 1341, 1344-46 (CA11 2001) (and cases cited therein).

reasserted in the Second Petitions were not time-barred under AEDPA, but "relate[d] back to and preserve[d] the filing date of the initial petitions." Pet. App. A15.

No other court has ever held that an otherwise untimely habeas petition relates back to a prior habeas petition in a proceeding that was dismissed and is no longer pending. Indeed, at least six other circuit courts of appeals have expressly declined to apply the relation-back doctrine in that manner. *See, e.g., Neverson v. Bissonnette*, 261 F.3d 120, 126 (CA1 2001) (relation-back doctrine did not apply where the dismissal of initial habeas proceeding left "nothing to which Petition No. 2 could relate back"); *see also Newell v. Hanks*, 283 F.3d 827, 834 (CA7 2002); *Marsh v. Soares*, 223 F.3d 1217, 1219-20 (CA10 2000); *Warren v. Garvin*, 219 F.3d 111, 113 (CA2 2000); *Nyland v. Moore*, 216 F.3d 1264, 1266 (CA11 2000); *Jones v. Morton*, 195 F.3d 153, 160-61 (CA3 1999); *cf. Hunt v. Hopkins*, 266 F.3d 934, 936-37 (CA8 2001) (amended petition related back to prior petition in *same* proceeding because *action* had not been dismissed). The majority's holding also conflicts with other Ninth Circuit precedent. *See, e.g., Green v. White*, 223 F.3d 1001, 1003 (CA9 2000) ("A second habeas petition does not relate back to a first habeas petition when the first habeas petition was dismissed for failure to exhaust state remedies"); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (CA9 2000) (same); *Henry v. Lungren*, 164 F.3d 1240, 1241 (CA9 1999) (same).

Moreover, Rule 15(c) by its very terms applies only to "[a]n amendment of a pleading"; because the Second Petitions did not constitute "amendment[s]" of the First Petitions, but were instead separate and distinct proceedings, relation back would not be appropriate under *any* circumstances.

The potential impact of the majority's holding is enormous: habeas petitions filed long after the expiration of AEDPA's limitation period would be rendered timely through relation back to a prior petition in a different proceeding, *even*

though that proceeding had been dismissed and was no longer pending. As the Fifth Circuit stated in rejecting such an approach:

> [I]f § 2244(d) were interpreted as Petitioner argues, the result would be impractical. A habeas petitioner could file a non-exhausted application in federal court within the limitations period and suffer a dismissal without prejudice. He could then wait decades to exhaust his state court remedies and could also wait decades after exhausting his state remedies before returning to federal court to "continue" his federal remedy, without running afoul of the statute of limitations.
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> * * * Construing an application filed after a previous application is dismissed without prejudice as a continuation of the first application for all purposes would eviscerate the AEDPA limitations period and thwart one of AEDPA's principal purposes. * * *

Graham v. Johnson, 168 F.3d at 780 (quoting in part the district court's decision dismissing a second habeas petition as untimely).

The majority's holding constitutes an unwarranted and ill-advised expansion of the relation-back doctrine, and in effect nullifies AEDPA's limitation period.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy Attorney General

KENNETH C. BYRNE
Supervising Deputy Attorney General

*PAUL M. ROADARMEL JR.
Deputy Attorney General
*Counsel of Record

Counsel for Petitioner